IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 246

LOCAL UNIONS Nos. 198, 262, 320, 546, 547, 571, AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,

Petitioners,

v.

JEWEL TEA COMPANY, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The National Independent Meat Packers Association hereby respectfully moves for leave to file a brief as *amicus curiae* in support of the respondent. The consent of the attorneys for the respondent has been obtained. The consent of the attorneys for the petitioners was requested but refused.

The National Independent Meat Packers Association is comprised of several hundred meat packing firms located in all parts of the United States, which are engaged in virtually every aspect of meat packing industry operations. Its membership thus includes both "slaughterers" and "processors", as well as many firms which are engaged in both types of operations. The word "independent" in the title of the Association's name indicates that the members, in general,

operate a single plant serving a community or region, in contrast to meat packers whose products have national or near-national distribution.

The basic question at issue in this case is the legality of a collective bargaining contract provision which prohibits the sale of fresh meat within the Chicago metropolitan area during certain hours. The litigants in this case represent the divergent views of the local unions and various employer-retailers. The restriction on the retail sale of fresh meat has a substantial adverse affect, however, on the meat packers who supply fresh meat to Chicago retailers. Furthermore, if such a restriction is declared to be legal in the case of the entire Chicago area, presumably similar restrictions could be put into effect in other areas all over the country. The meat packing industry therefore will be vitally affected by the outcome of this litigation. For these reasons, and for the additional reasons set forth in the accompanying brief, the National Independent Meat Packers Association respectfully requests permission to file the accompanying brief as *amicus curiae* setting forth its views and position with respect to the issues in this case.

Respectfully submitted,

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ARGUMENT

INTRODUCTION

This case presents important issues with respect to the interrelationship of the federal antitrust laws and the labor laws. It is apparent that the underlying policies of the two sets of laws frequently will conflict, inasmuch as one of the basic objectives of the antitrust laws is to prevent concerted restraints against competition, whereas a declared purpose of the labor laws is to sanction certain concerted activities of labor unions as being beyond the purview of the antitrust laws.

The focal point of this controversy is a provision in a labor agreement between Chicago food retailers and their unions which effectively prevents the public at large in the city of Chicago and the surrounding area from being able to purchase fresh meat after six o'clock in the evening. The legality of this provision is of vital concern to the members of the National Independent Meat Packers Association. It involves serious restrictions on the marketing of fresh meat, and it presents important questions concerning the extent to which labor agreements may interfere with management's right to control its business so that it may compete freely in meeting legitimate consumer demands.

The restrictive provision at issue here reads "Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above . . . ." (R. 17x, 18x § 5.1) The order granting certiorari in this case limits

the scope of review to the first two of the six "Questions Presented" set forth in the unions' petition for certiorari. This brief is directed only to the first question, which may be defined more accurately in two parts, as follows: (a) whether a provision in a multi-employer collective bargaining contract which effectively prohibits the sale of fresh meat within a large metropolitan area during periods of substantial consumer demand constitutes an unreasonable restraint of trade and (b) if so, whether such provision nevertheless is immunized from the force of the Sherman Act[1] by the "labor exemption" afforded by the Clayton[2] and Norris-LaGuardia[3] Acts.

I.

THE MARKET OPERATING HOURS RESTRICTION CONSTITUTES AN UNREASONABLE RESTRAINT OF TRADE

The Seventh Circuit Court of Appeals, in its opinion in the interlocutory appeal upholding the sufficiency of the complaint, ruled that a trial was necessary in this proceeding. The parties were to present evidence concerning "facts peculiar to the business to which the restraint is applied," "the nature of the restraint and its effect, actual and probable," "the history of the restraint", etc. (274 F. 2d 217, 223) This evidence would permit a determination as to whether the market operating hours restriction effected an unreasonable restraint of trade. The evidence adduced demonstrates that the restriction does cause a number of restraints of trade which are clearly unreasonable.

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[1] 26 Stat. 209, 15 U.S.C. 1.

[2] 38 Stat. 730, 15 U.S.C. 12.

[3] 47 Stat. 70, 29 U.S.C. 101.

A. The Market Operating Hours Restriction Suppresses Competition Between Suppliers of Fresh Meat and Suppliers of Meat-Substitute Food Products.

Since the primary competitive substitutes for fresh meat, *i.e.* poultry and fish, are available to consumers when fresh meat is not, there is no question that the restriction must of necessity affect competition between fresh meat and these primary substitute food products.[4] Indeed the restriction against the sale of fresh meat during the prime evening shopping hours, when these substitute products are available, results in a serious competitive disadvantage to Chicago purveyors of fresh meat.

A graphic indication of the extent of such competitive disadvantage may be gleaned from the testimony of the unions' primary witness, who stated that the reason "permission" was granted to retailers in 1957 for the sale after 6:00 p.m. of fresh poultry (which theretofore had been subject to the same restriction presently applicable to fresh meat)was that "the sale of frozen poultry had made such inroads into the market, and particularly from 6:00 to 9:00, that sale of fresh poultry . . . was slowly but surely dying on the vine." (R. 600)

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[4] Although the district court found that "[T]here is no evidence . . . that [the restriction] . . . adversely affected one purveyor more than another," citing *Philadelphia Record Co.* v. *Mfg. Photo-Engravers Ass'n of Philadelphia*, 155 F. 2d 799 (3rd Cir. 1946), it is apparent that this finding involves a comparison only between purveyors "of fresh meat," inasmuch as the first portion of the finding explicitly refers to "competition among purveyors of fresh meat" and the cited *Philadelphia Record Co.* case does not deal with competition between suppliers of different products but only with competition between suppliers of a like service, *i.e.*, photo-engraving.

B. The Market Operating Hours Restriction Suppresses Competition Between Food Retailers in the Chicago Area.

The single, overriding factor in this case, which stands out above all else, is that the effect of the market operating hours restriction has been to frustrate entirely the respondent's desire to sell fresh meat during evening hours in response to demonstrated consumer demand therefor. The unions have tried to gloss over this fact by implying that the "fluctuating attitudes" of and absence of any real desire on the part of a majority of retailers in the Chicago area to provide evening sales of fresh meat indicate the "doubtful benefits" thereof and a lack of any substantial consumer demand therefor. There is, of course, little logical connection in the circumstances presented here, between the failure to provide evening sales of fresh meat and the existence of consumer demand for such sales.

In any event, the absence of a desire on the part of retailers, generally, to provide evening sales of fresh meat, far from justifying the restriction would, on the contrary, tend to prove its illegality. The effect of the restriction, in such case, actually is to abet the retailers' lack of desire to compete with each other, or more specifically with Jewel Tea Co., in the sale of fresh meat during evening hours. Whatever arguments petitioners may advance to the contrary, therefore, the plain fact remains that the marketing hours restriction does have the effect of (a) suppressing competition between meat retailers in the Chicago area through increased utilization of self-service counters and (b) completely eliminating competition between such retailers with respect to hours of service.

C. The Market Operating Hours Restriction Suppresses Other Segments of Competition in the Chicago Area.

It is difficult to determine the full extent of the restraints on various other segments of competition caused by this artificial restriction on marketing hours which disrupts the normal free flow of fresh meat from the producer to the consumer. However, it is apparent that in addition to the competition described in the preceding two sections, the restriction also affects competition (a) between fresh meats and processed meats, (b) between fresh meats and non-meat protein foods such as macaroni, noodles, non-meat pizza, cheese, etc., and (c) between food retail stores and restaurants.

D. The Market Operating Hours Restriction Is Unreasonable.

Since, as discussed above, the restriction on the marketing hours does suppress competition and restrain trade in the sale of fresh meat, it must be considered whether this restraint is a reasonable one.

The ruling of this Court in *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918), is highly pertinent on this question. In that case, this Court upheld a commodity exchange regulation which restricted free competition to some extent but, on balance, served to promote competition rather than to restrict it. This Court set out the basic test of reasonableness as follows:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition." (246 U.S. at 238),

and it then went on to specify the types of matters to be considered in thus determining reasonableness.

These were the same matters[5] as those specified by the Court of Appeals below in sending this case back for trial.

The test established by this Court in the *Chicago Board of Trade* case continues to be the accepted standard for determining the reasonableness of restraints on competition. Cf. *White Motor Co.* v. *U. S.*, 372 U.S. 253 (1963); *Rogers* v. *Douglas Tobacco Trade, Inc.*, 244 F. 2d 471 (5th Cir. 1957); *U. S.* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960).

Hence, it must be determined whether the restriction here in question, on balance, restrains or promotes competition. That the marketing hours restriction has the effect of suppressing competition in a number of different areas has been demonstrated in the previous three sections. Indeed the appellate court summarized the evidence as follows:

> "There is *no* evidence in *this* record showing that the net effect of the market hours restraint promotes competition. The opinion of the district court is devoid of *any* finding to that effect. On the contrary, the record shows that the effects of the restriction are wholly negative and destructive of competition." (331 F. 2d at 550).[6]

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[5] *I.e.*, "facts peculiar to the business to which the restraint is applied," "the nature of the restraint and its effect, actual and probable," "the history of the restraint", etc. (See p. 2, *supra.*)

[6] The Solicitor General's *amicus* brief in this proceeding notes that the provision regarding marketing hours "restricts commercial competition among employers in the sale of goods to such an extent that it would violate Section 1 if entered into by employers alone, acting solely in their own self-interest." (Br. pp. 8-9). It should be noted further that in reaching this conclusion the Solicitor General was considering only one of the several areas of competition in which the restriction imposes a restraint, *i.e.*, competition between food retailers.

One important factor to be taken into consideration in determining reasonableness under the test set forth in the *Chicago Board of Trade* case is "the purpose or end sought to be attained" by imposition of the restraint. (246 U.S. at 238) The purposes stated by the unions for their desire to have the restriction are, in essence, (a) to prevent butchers from having to do "night work" (by which is meant evening work between 6 and 9 p.m.), (b) to prevent non-butchers from handling, wrapping, or otherwise dealing with fresh meat and (c) to prevent "over-loading" butchers by requiring them to prepare additional meat during the daytime for sale from self-service counters after 6 p.m. The speciousness of these aims, as related to the restriction on marketing hours for fresh meat, is easily demonstrable.

In the first place, the labor contract requires that only butchers will be permitted to handle, wrap, or otherwise deal with fresh meat. There is no reason to believe that the employer-retailers would not honor this provision in the event they were permitted to provide evening sales of fresh meat from self-service counters, and arguments to the contrary are nothing more than pure speculation. Secondly, let us assume, *arguendo*, (a) that there is need for a butcher on duty in connection with evening sales from self-service counters, or (b) that full service counters will be operated in the evening, or (c) that additional meat did have to be prepared during the day for evening sales. All of these factors actually would produce additional jobs for butchers rather than work to their disadvantage. Furthermore, it is apparent that only one of these factors—evening operation of full service counters—would require any appreciable number of butchers

to work after 6 p.m. However, the trial court found that there are butchers willing to work after 6 p.m. (215 F. Supp. at 844), and there may even be some who would prefer to do so, as far as is known. Thus, the restriction actually serves (a) to reduce the number of jobs available to butchers and (b) to prevent some butchers from earning extra pay by working during evening hours or working at times possibly more convenient to them, while at the same time seriously inconveniencing the consumer public.[7]

In any event, it is clear that there is no need for the blanket restriction against sales of fresh meat after 6 p.m. inasmuch as the matter could readily be solved by union-employer collective bargaining as to the wages to be paid those few butchers who might be needed to work after 6 p.m. in connection with self-service counter operations. A blanket restriction against *all* sales of fresh meat after 6 p.m. therefore is unnecessary and unreasonable. Since the marketing hours restriction clearly is an unreasonable restraint of trade, the only question remaining is whether or not it comes within the so-called "labor exemption".

II.

THE MARKET OPERATING HOURS RESTRICTION IS NOT PROTECTED BY THE "LABOR EXEMPTION"

The "labor exemption" afforded by the Clayton and Norris-LaGuardia Acts is relatively narrow and sharply defined. Sections 6 and 20 of the Clayton Act exempt labor unions (a) when they are carrying out

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[7] The plaintiff "adduced testimony of numerous witnesses that they were inconvenienced by the restriction on night sales of fresh meat, and would buy more meat if night hours were available." (215 F. Supp. at 844).

their "legitimate objects" and (b) in cases involving or growing out of a dispute "concerning terms or conditions of employment." Similarly, Section 4 of the Norris-LaGuardia Act grants labor unions an exemption in cases involving or growing out of a "labor dispute", which is defined in Section 13 of the Act to include only controversies concerning (a) "terms or conditions of employment" or (b) "the association or representation of persons" for collective bargaining purposes.

There is no controversy here concerning "the association or representation" of butchers, since no one has questioned the right of butchers to organize or the right of the union petitioners to speak for them. Thus, the only matters to consider in determining the applicability of the "labor exemption" here are (a) whether a restriction on market operating hours is a legitimate objective of labor unions and (b) whether the matter of market operating hours is a "term or condition of employment." Both of these questions, we submit, must be answered in the negative.

The petitioners here would extend the "labor exemption" far beyond any previously defined limits. In fact they make the suggestion that only three requirements are necessary for a restriction such as is involved in this case to fall within the "exemption", i.e., (a) it must have been arrived at through "arm's length bargaining," (b) the union must have been acting in what it considered to be its own self-interest and (c) the union must have been acting "independently of aid to a business men's combination". (Br. pp. 61-62) The absurdity of this position is apparent when one realizes that this would permit labor unions to effectuate practically unlimited restraints of trade, so long as they

acted in their own self-interest and independently of aid to employer groups, merely by showing that such restraints had some indirect effect on terms and conditions of employment.

This Court has clearly ruled, however, that a restraint effectuated by a union acting in what it considered to be its own self-interest in enhancing the terms and conditions of employment of its members is not exempted from the Sherman Act unless it is a necessary result of an agreement upon terms and conditions of employment. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 (1945); *U. S.* v. *Employing Plasterers Ass'n.*, 347 U.S. 186 (1954); *U. S.* v. *Women's Sportswear Manufacturers Association*, 336 U.S. 460 (1949); *United Brotherhood of Carpenters* v. *U. S.*, 330 U.S. 395 (1947). The rationale of these cases is that union demands which are not directly related to terms and conditions of employment and which are thus not necessary to attain legitimate labor objectives are not protected activity within the "labor exemption."

The petitioners claim that market operating hours constitute a term or condition of employment because they are "rooted" in working hours, in wages, and in other conditions of employment. (Br. p. 63) Actually, elimination of the restriction on marketing hours would have no necessary effect on the wages, number of hours worked, or workload of the members of the butchers unions. The unions can bargain as to all these matters. However, by insisting upon restrictions which limit the time of day during which an entrepreneur may market his wares a union exceeds its legitimate labor objectives and intrudes into an area which

affects a basic managerial decision historically reserved to the entrepreneur.

This Court's latest pronouncement on this subject was in its recent decision in *Fibreboard Paper Products Corp.* v. *NLRB*[8] where the Court explicitly recognized the necessity of protecting an employer's freedom to manage his business. In *Fibreboard* the Court required an employer to bargain with respect to contracting out of plant machinery maintenance work only after finding that (a) the action proposed by the employer affected job security and (b) requiring him to bargain "would not significantly abridge his freedom to manage the business." (33 U.S.L. Week at 4092) In the instant case, however, there is no *bona fide* issue of job security, and the restriction obviously does abridge the freedom of food retail store operators in the Chicago area to manage their businesses. Thus this case falls squarely within the category of cases cited by Justice Stewart, in his concurring opinion in the *Fibreboard* decision, with the observation that "at least seven circuits have interpreted the statutory language ['conditions of employment'] to exclude various kinds of management decisions from the scope of the duty to bargain." (*Id.* at 4095) [Footnote citations omitted.] In order to distinguish the cited cases from the *Fibreboard* case, Justice Stewart added "Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding . . . managerial decisions, which lie at the core of entrepreneurial control" and "those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge

[8] 33 U.S.L. Week 4089 (U.S. Dec. 15, 1964).

only indirectly upon employment security should be excluded from that area." (*Ibid.*)

As stated by the Court of Appeals in the instant case, "Setting marketing hours is one such proprietary function which an employer has the exclusive right to determine as dictated by economic factors present within his trading area." (274 F. 2d at 221) The unions' attempt to control these hours not only usurps the legitimate proprietary function of the employer but also subjects the general public to great inconvenience and should not be protected from the force of the antitrust laws.

The petitioners place reliance primarily on two cases—*Railroad Telegraphers* v. *Chicago and North Western Railroad Co.*, 362 U.S. 330 (1960), and *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 260 F. 2d 46 (8th Cir. 1958). These cases are distinguishable from this case, however. The *Adams* case resulted from a dispute over an industry-wide wage formula and thus clearly, unlike the instant case, involved a term or condition of employment, *i.e.*, wages. The *Railroad Telegraphers* case involved a controversy with respect to job security resulting from the proposed abandonment or consolidation of unnecessary railroad stations. Petitioners argue that the holding of this case is directly in point, claiming that job security of union members is one of the purposes of the marketing hours restriction. The fact is that far from protecting butcher jobs the restriction actually *limits* the number of jobs which otherwise would be available for butchers.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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